N KRISHNA MOORTHY SA NAVARATNAM & ANOR A

v.

ORIENTAL CAPITAL ASSURANCE BHD & ANOTHER CASE

B

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[SUITS NO: D8-22-257-2007
(PREVIOUSLY S3-22-1233-2002; S2-22-1232-2002)]
15 OCTOBER 2009 C

CIVIL PROCEDURE: *Fraud - Standard of proof in civil action - Criminal fraud in civil action - Proof beyond reasonable doubt - Burden on party alleging fraud*

D

EVIDENCE: *Standard of proof - Fraud alleged in civil case - Criminal fraud in civil action - Proof beyond reasonable doubt - Burden on party alleging fraud*

INSURANCE: *Allegation of fraud - Ingredients of - Whether exaggerated or inflated claim - Whether fire deliberately started by insured - Whether constitutes fraud on insurers - Whether relieves insurers of liability - Burden and standard of proof* E

INSURANCE: *Fire insurance - Destruction of dwelling house by fire - Refusal by insurer to pay insured on ground that claim fraudulent - Whether fire a result of deliberate act of arson - Expert evidence - Whether relieves insurers of liability* F

INSURANCE: *Fire Insurance - Proof of loss - Destruction of dwelling house by fire - Whether exaggerated or inflated claim for value of household contents - Loss recoverable on items destroyed based on market value of similar items - Whether maximum amount insured recoverable - Claim for cost of removing debris - Claim for reconstruction of house - Claim for alternative accommodation - Whether claims proven - Whether claims reasonable* G

H

The plaintiffs (husband and wife) brought two separate claims under two separate insurance policies against the defendants for destruction of their dwelling house in a fire. The defendants resisted both the claims on the basis that the claims were fraudulent. The plaintiff, M Krishna Moorthy (PW1) gave evidence that the premises and its household items were completely I

destroyed in the fire which occurred when PW1 and his family were away for a holiday. The cause of the fire was stated as unknown in the Fire Brigade report. It was the plaintiffs' case that the fire was a result of spontaneous combustion. On the other hand, the defendants claimed that the fire was deliberately started by the plaintiffs, in particular PW1. There was dispute as to the value of the destroyed household items being claimed by the plaintiffs. The plaintiffs also claimed: (i) 10% of the amount insured for cost of removal of debris; (ii) RM492,786.13 for the re-construction of the premises which was said to cost RM568,889.78; and (iii) RM80,000 for cost of alternative accommodation pending rebuilding of the house. PW1 had increased the insured sum of the house from RM300,000 to RM800,000 prior to the fire. The issues to be determined were, *inter alia* whether liability against both the defendants had been proven, and if so what was the quantum.

Held:

(1) The burden of proving fraud is on the party who alleges fraud. The standard required to prove fraud is beyond reasonable doubt. In this case, the fraud complained of against PW1 amounted to a criminal case. (paras 9 & 10)

(2) It was not conclusively proved that there was an even burning pattern. Therefore, there was a possibility that the fire could have been caused by an oil lamp at the altar, arson due to break in or spontaneous combustion. The defendant failed to discharge the burden of proving beyond reasonable doubt that the fire was deliberately started by PW1. Further, the fact that after ten years, there was no action taken by the police against PW1 was also *prima facie* evidence that the allegation that PW1 deliberately set the fire was not proven. (paras 19 & 20)

(3) The plaintiffs' claim was not grossly exaggerated to defraud the defendant. Difference in figures and non availability of items do not proof there was an intention to defraud the defendant. Just because the items could not be located, it did not mean the items were not there in the first place. The items could have been burnt beyond recognition. The items per the list prepared by PW1 must be taken to be true in view of the declaration made by PW1 in the insurance proposal form. PW1's unchallenged evidence that the price he quoted were the actual price but he cannot support it with

the documents as the same were destroyed in the fire lent support that the missing items did exist prior to the fire. Except for jewellery and electrical equipments which were on the high side, the rest of the figures seemed reasonable. Even assuming the plaintiffs' claim was grossly exaggerated, the defendant had to show that PW1 inflated the claim to defraud them. The defendant thus failed to discharge the burden of proof to show that PW1 had intended to defraud the defendant. (para 35)

(4) PW1 had done extensive renovation to the house. Taking into account the renovation, PW1 was entitled to say the value of his house had gone up to RM800,000. In the circumstances, the defendants failed to discharge the burden of proving PW1 was lying and had no justification to increase the sum insured. (para 39)

(5) The plaintiffs had established on the balance of probabilities that their claim was not fraudulent and they had not breached any of the policies' conditions. As such, the defendants were liable to indemnify the plaintiffs the losses suffered by them. (para 42)

(6) It is trite law that the loss recoverable on items destroyed would not be based on the replacement value but the market value of a similar property at the time of the fire bearing in mind the age, the characteristic and condition of the insured items. The plaintiffs claimed the maximum amount insured was, *ie*, RM400,400. On the basis that PW1 may have overestimated or overstated the value of the items as well as taking into account depreciation, it was not reasonable to allow the maximum amount claimed. (para 43)

(7) The plaintiffs failed to prove the cost incurred in removing the debris. Special damages must be strictly proven. As such, the claim for debris removal was rejected. Taking into account the renovation work done to the house, RM492,786.78 was reasonable to enable PW1 to rebuild the house with similar renovation. The sum of RM80,000 for alternative accommodation was also reasonable. (para 43)

[order accordingly.]

Case(s) referred to:

Asean Securities Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Chan Chwen Kong v. PP [1962] 1 LNS 22 HC ***(refd)***

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Globe Trawlers Pte Ltd v. National Employers Mutual General Insurance Association Ltd & Anor [1989] 1 CLJ 831; [1989] 2 CLJ (Rep) 924 HC ***(refd)***

Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***

Wong Cheong Kong Sdn Bhd v. Prudential Assurance Sdn Bhd [1998] 1 CLJ 916 HC ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Other source(s) referred to:

Wedford and Otter-Harry's, *Fire Insurance*, 3rd edn, p 256

For the plaintiffs - T Thiyages (T Puvan with him); M/s Fauzi Ngah & Neasa

For the defendants - R Mohan Krishnan (S Selva with him); M/s Kumar Partnership

Reported by Amutha Suppayah

JUDGMENT

Hadhariah Syed Ismail JC:

[1] This two consolidated actions involve two separate claims brought by the plaintiffs under two separate insurance policies. The plaintiffs claim was resisted by both the insurance company on the basis the insured made a fraudulent claim.

The Plaintiffs' Claim Under Oriental Capital Assurance Policy

[2] As pleaded under para. 9 of the amended statement of claim, the plaintiffs' claim for the followings:

(a) A sum of RM400,400 for loss and damage;

(b) A sum of RM40,040 being cost for removal of debris; and

(c) Interest

The Plaintiff's Claim Under Jerneh Policy

[3] Under this policy, the plaintiff's claims:

(a) Cost of reconstruction a building in the sum of RM492,786.13;

(b) A sum of RM80,000 for cost of removal of debris;

(c) Cost of alternative accommodation in the sum of RM80,000 and

(d) Interest.

Defendant's Defence And Counterclaim

[4] The defendant resisted the plaintiffs' claim on the following grounds:

1. That the fire was not fortuitous in nature and that the evidence expressed by the defendant's experts clearly establish that the cause and spread of the fire is highly abnormal in nature. Furthermore all other circumstances surrounding the fire indicate that the fire could not have occurred without the complicity and involvement of the plaintiff and/or his agent.

2. The plaintiff is in breach of general condition 11 of the policy and is therefore not entitled to any benefit under the policy.

3. The plaintiff is in breach of the fundamental principles of utmost good faith and in breach of the warranty of truth and the claim for reconstruction costs is not in compliance with the reinstatement value clause in the policy.

4. In consequence thereto, the defendant, Jerneh Insurance Bhd counter-claim for the sum of RM307,213.87.

Background Facts

[5] The plaintiffs are husband and wife. For the purpose of this trial, only the plaintiff M. Krishna Moorthy gave evidence. He will be referred to as PW1. PW1 is the registered owner of a dwelling house with an address at No. 3, Jalan SS 3/92, Petaling Jaya, 47300 Selangor (the premises). Both the plaintiffs bought a Householder Insurance Policy No. D99AGFHOC000049 from the defendant, Oriental Capital Assurance Berhad (OCA Policy) insuring household items in the premises against *inter alia*, the fire damage and/or loss by theft. A "List" of household items was attached to the policy. The policy was issued on 1 March 1999.

The policy is valid for the period from 18 January 1999 to 17 January 2000. At the date of issue, the sum assured is RM400,400. PW1 was also issued with a houseowner Insurance Policy No. HQF012898/R00 by the defendant, Jerneh Insurance Berhad (Jerneh Policy) insuring the building excluding foundations against *inter alia*, fire damage. This policy was issued on 24 December 1998. The policy is valid for the period from 21 December 1998 to 31 December 1999. Initially the sum assured was RM300,000. On 10 March 1999, the sum insured was increased to RM800,000.

[6] PW1 had charged the premises together with the land on which the premises was erected to Citibank Berhad as security for a loan of RM300,000. Defendant, Jerneh Insurance Berhad has paid a sum of RM307,213.87 to Citibank on behalf of PW1 on a without admission of liability basis under the insurance policy to redeem the property.

[7] On 3 May 1999 at around 3am, a fire occurred on PW1's premises, which destroyed the premises and its household items completely. At the material time, there was no occupant in the premises. PW1 and his family was away in Melaka for a holiday. PW1 does not know the cause of the fire. Fire Brigade report dated 18 May 1999 states the cause of the fire as not known. It is the plaintiffs' case that the fire was a result of spontaneous combustion. On the other hand, it is the defendant's case that the fire was deliberately started by the plaintiffs, in particular PW1. The plaintiffs bring these actions claiming for an indemnity under the policies against the defendants. The defendants repudiate both claim under various grounds.

Issues To Be Determined By The Court

1. Whether liability against both the defendants have been proven and if so;
2. What is the quantum.
3. Whether the defendant 's counterclaim should be allowed.

Liability

The Law On Fraud

[8] Since the defendant's case is based on an allegation of fraud, I think it is appropriate at this juncture for me to state the law governing the defence of fraudulent claim. For this, I refer to the

case of *Wong Cheong Kong Sdn Bhd v. Prudential Assurance Sdn Bhd* [1998] 1 CLJ 916, wherein the late Vincent Ng J quoted with approval a passage by Raoul Colinvaux in the *Law of Insurance* who lucidly states:

> One of the consequences of the principles that a contract of insurance is one of the utmost good faith (see *Heyman v. Darwins* [1942] AC 356 at p 365) is that fraudulent claims made under it give the insurers the right to avoid (see *Stebbing*'s case [1917] 2 KB 433 at p 438) the whole policy. Thus, if the assured makes a fraudulent claim, he cannot recover at all (see *Norton v. Royal* [1885] 1 TLR 460), and conditions in the policy to this effect (see *Jureidini v. National British* [1915] AC 499) are declaratory of the legal position without them.
>
> A statement made by the assured is fraudulent if he knows it to be false and makes it in order that the insurers may act upon it. The most common examples are claim by an assured who has himself destroyed the property insured, or grossly exaggerated claims. Mere exaggerations, however, is not conclusive evidence of fraud (see *London Assurance v. Clare* [1937] 57 LI LR 254 at p 268), for value is often a matter of opinion and though such exaggeration will amount to fraud if it is dishonestly made, or so greatly in excess of the true amount as to be incompatible with good faith (see *Chapman v. Pole* [1870] 22 LT 306).

[9] The burden of proving fraud is on the party who alleges fraud. The standard required to prove fraud is beyond reasonable doubt. Federal Court in the case *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, at p. 230 held:

> With regard to the standard of proof to be applied in civil proceedings, a clear distinction must be drawn as between "forgery" and "fraud". The general rule is that proof in civil proceedings of facts amounting to the commission of a crime (including forgery) need only be on a balance of probabilities. However, the common law of Malaysia has developed an exception to this general rule; hence, where fraud (as opposed to forgery) is alleged in civil proceedings, it (the alleged fraud) has to be proved beyond a reasonable doubt.

[10] In this case, the fraud complained of against PW1 amounted to a criminal case. As regard the degree and nature of proof required in a case involving allegations of criminal fraud, I refer to the case of *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134, Supreme Court had this to say:

A We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion or conjecture (*Narayanan v. Official Assignee, Rangoon* AIR 1941 PC 93; *Saminathan v. Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case.

C **[11]** With those principles of law in mind, I will now consider the two issues raised by the defendant, namely:

1. Was the fire deliberately started by PW1.

2. Was the claim a fraudulent claim.

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Was The Fire Deliberately Started By PW1

[12] To prove their case, the defendants have called two witnesses. DW1, was a fire investigator from Forensic Services (M) Sdn Bhd. In his testimony, he states that he went to the premises of the fire five days later. He had made not less than four visits before he could make a report which was marked as NKM 7. From his observations and investigation at the site he makes a conclusion that the fire was most likely to have been caused deliberately by PW1. He gave the reasons for coming to the said conclusion as follows:

1. The fire damage was even as though the various areas of the house was burnt at the same time. In a natural fire, there would be an area of origin which is more severe than the others.

2. There were signs of forced entry to the front door. His interview with the firemen indicated that the damage was not done by them.

3. The numerous items relating to electronic equipments missing from the scene of the fire is strange.

4. If stolen by unknown persons, the safe allegedly contained RM50,000 worth of jwellery should have been carted away too as a great deal of time is involved in opening the safe without force.

5. Fires during break in by thieves are nuisance fires and do not reflect the systematic and methodical nature of this fire. A

[13] However, during cross-examination, DW1 agree to the following facts:

1. That fire could start on its own spontaneous combustion ie, a material can be ignite without external source of ignition. It is usually as a result of self heating of agricultural product or reaction of chemicals. An example would be newspaper contaminated by unsaturated oil. B C

2. Due to a sign of forced on the wooden door, it is possible that a break in had taken place.

3. That his evidence about an even burning of the entire building contradict the observation made by Mr Tan Eng Hye (DW3) of GAB Robins, Loss Adjuster. Mr Tan Eng Hye in his observation at the site of the fire notice the left side of the building had suffered more extensive fire damage than the right side. D

4. That he cannot possibly know how this particular safe would react when exposed to intense fire. E

[14] Having read the report made by DW1, I cannot avoid from saying DW1 seems to have focus more on deliberate fire. He admits that there are other possibilities as to how a fire could have begun. One possibility is spontaneous combustion. Although he says there were certain conditions to be met before spontaneous combustion could apply, he did not carry out investigation on this at the site. He did not and cannot say for certain that the conditions for spontaneous combustion were not present in this case. Therefore he is not in a position to rule out spontaneous combustion because he did not carry out investigation on it. Another aspect of his evidence which is not convincing is when he says the fire was likely to be deliberately started by ignition at a number of locations. When asked to identify the specific number of locations, he was unable to do so. He was further asked this question: F G H

Q: So, how are we to know that it was started at a number of locations? I

A: I based on the even burning pattern which likely as a result of ignition at a number of locations.

[15] Next was the evidence of DW3, a loss adjuster. This witness has prepared two report. The first report is dated 26 May 1999 (preliminary report). The second report is dated 26 November 1999. Between the two report, the preliminary report is the relevant one because the second report was made in reliance of the report made by DW1. The relevant paragraphs of the preliminary report contained the following statements:

> 4.3 Enquiries revealed that most of the time the oil lamp was lit. There is therefore a possibility that the fire source came from this oil lamp at the altar.
>
> 4.4 The left side of the building had suffered more extensive fire damage than the right side. This was deduced from our examination of the building in details and also the pattern of the burning such as the fact that plants on the left side were found scorched as opposed to the right side of the building where there were lesser burning noted.
>
> 4.5 The severe burning on the left side of the building would also lend support to our inference that the fire arose from the oil lamp in the insured's mother room which is located on the left side of the building.

[16] Like DW1, DW3 in his oral testimony makes a conclusion that the fire was deliberately started by PW1 based on the same reasoning given by DW1. During cross-examination, he was referred to paras. 4.3, 4.4 and 4.5 mentioned above but DW3 denied making those statements. Instead, DW3 now says there was an even burning pattern, obviously in reliance of DW1's report.

[17] Only one aspect of his evidence which is in favour of PW1 and that is when he says PW1 appears to have made prompt payment on his installments from January to the time of the fire.

[18] In my opinion, DW1's evidence of an even burning pattern is to be tested with the content of the preliminary report made by DW3 which says that the left side of the building suffered extensive fire damage than the right side. It is be noted that this contradiction relates to a visual examination which was made much earlier than the observation made by DW1 and does not require expert qualification. Although DW1 said the contradiction is minor, it creates doubt in my mind whether it was an even burning pattern or not. In short, having seen and heard DW1's, I cannot avoid from saying that this witness has set his mind that the fire was deliberately caused by PW1 and deliberately omitted

to conduct investigation on other alternative. His investigation and conclusion is based solely on his observation of the even burning pattern, which observation was proved not conclusive. In the circumstances, I hold that DW1's evidence is full of uncertainty, guess work and unsubstantiated.

[19] With regard to DW3, my first impression when he disagree with his own observation he made in the preliminary report is he is not telling the truth. He did not explain why he disagree. Neither did he say his findings in the preliminary report is wrong. So there are two contradictory statements from DW3. In view of the contradiction on the burning pattern, I hold that it was not conclusively proved that there was an even burning pattern. If that is so, there is a possibility that the fire could have been caused by an oil lamp at the altar, arson due to break in or spontaneous combustion. Most importantly, there is not an *iota* of evidence that the fire was deliberately started by PW1. Having reviewed the evidence of both DW1 and DW3, I am in grave doubt as to where and how the fire started. The Defendant has failed to discharge the burden of proving beyond reasonable doubt that the fire was deliberately started by PW1. In the case of *Asean Securities Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1, on the question of proof, Federal Court quote Wedford and Otter-Harry's work on *Fire Insurance* (3rd edn) p 256 reasoned thus:

> If the property is actually burned, the loss is in fact caused by fire and the policy therefore covers it unless the insurers succeed in establishing that the fire was originated by an excepted cause. Where the result of the evidence is to leave the cause of the fire in doubt, the insurers have not discharged the onus of proof and the assured therefore will succeed. Further, if the insurers rely on the defence of arson by or with the privity of the assured, the charge, being in effect a criminal charge, must be strictly proved. Hence, where the evidence leaves it open whether the loss was caused by accidental fire or arson, the assured must recover since the presumption against crime operates in his favour.

[20] Even if I am wrong in coming to the above conclusion, I cannot ignore PW1's evidence that he was detained for eight days by the police at the Petaling Jaya Police Station on suspicion that he could have set the fire to his own house. He was released on bail and till today, no action or charge was preferred against him. The fact that after ten years, there was no action taken by the police against him is *prima facie* evidence that the allegation of PW1 deliberately set the fire is not proven.

A **Was The Claim Fraudulent**

[21] The defendants say the plaintiffs' claim is fraudulent based on various reasons. They relied on circumstantial and direct evidence adduced by DW1, DW2 and DW3. Suffice for me to
B list out the evidence in brief here.

[22] Direct Evidence Of Fraud

1. The defendants' forensic expert (DW1) and two loss adjusters (DW2 and DW3) have established that a large portion of the
C household items, electrical appliances and equipments claimed to be damaged by the fire, were either removed or were non existent prior to or at the time of the fire as there were no residual evidence of the same after the fire.

D 2. There were no residual evidence of jewellery worth RM50,000 allegedly kept in the safe in the premises at the material time, which were claimed to be damaged by the fire or stolen.

3. The door to the safe containing the jwellery was found ajar and undamaged after the fire and there was no signs of it
E being forcibly opened. PW1 admitted that only he and his wife knew the combination. Therefore only PW1 and/or his wife could have taken out the jwellery from the safe before the fire.

4. The evidence shows that the safe had been opened prior to
F the fire as the internal compartment of the safe had suffered fire damage. If the safe was closed, the internal compartment could not have suffered fire damage.

[23] Circumstantial Evidence Of Fraud

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1. PW1 increased the sum insured under Jerneh Policy by RM500,000 one and a half month before the fire.

2. PW1 and his companies were in financial difficulties and heavily indebted. This is evident from the followings:

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(i) Visual Production was wound up for RM40,000;

(ii) RHB Bank filed proceedings to foreclose his property at 6B, Pearl Court Apartment, Jalan Thamby Abdullah, Kuala
I Lumpur. He owed RHB RM20,000;

(iii) He owed Carlsberg Marketing Sdn Bhd RM10,005;

(iv) Another company which he was a director cum shareholder ie, Zen Pictures (M) Sdn Bhd had gone into voluntary winding up.

3. PW1 defraud Malaysia British Assurance Bhd when he bought an Equipment & Machinery insurance for his company, Visual Production Sdn Bhd, knowing fully well that Visual Production has been wound up at the time the insurance was purchased.

4. PW1s' did not respond immediately on being informed of the fire. Only 12 hours after being informed of the incidence,PW1 return to his house.

5. There was no justification for PW1 to increase the sum insured by RM500,000.

[24] Counsel for the defendants submit that when the evidence is circumstantial in nature, the combined effect of each evidence must be considered. He cited the following cases to support the proposition of the law.

1. *Chan Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22; and

2. *Sunny Ang v. Public Prosecutor* [1965] 1 LNS 171 FC.

[25] Counsel then submit that the cumulative effect of the circumstantial evidence coupled with the direct evidence leads to an irresistible conclusion that the Plaintiffs' claim is fraudulent in nature.

[26] With the greatest of respect, I disagree with the counsel's submission for the following reasons:

1. With regard to the non availability of most of the household items at the premises at the time of the fire, PW1's evidence was he did not remove any of the items from the premises prior to the fire. This is a positive averment. On the other hand the defendants' forensic expert and loss adjuster only made an assumption simply because there was no debris of the same. At the same time, DW1 also agrees that there are possibilities some household goods to become unidentifiable due to certain intensity of the fire. Therefore this court cannot ruled out that these missing household items could have been burnt beyond recognition.

2. DW1 also in his evidence agrees that from the wooden door that has been forced from the outside, there is a possibility a break in could have taken place and the items being stolen. In short there are two possibilities for the missing items. Taking into consideration all the evidence adduced, I am more incline to believe and accept PW1's evidence as being the more probable one. With the court's finding that the fire was not deliberately started by PW1, there simply is no reason for PW1 to remove the items.

3. With regard to the allegation of his having a financial difficulties, PW1's explanation is as follows:

> All the financial problem sated above are not directly related to me. The foreclosure proceedings by RHB Bank, the property was actually sold to a third party who could not pay the balance purchase price after the initial 10% was paid. I left it to the bank to auction the property in order to recover some money which eventually the bank actually sold the property to actually make some money. The problem with Carlsberg Marketing, I had a restaurant cum pub in Damansara Height which I sold the entire business for RM300,000.00 but because the contract that I signed with Carlsberg was still under my name, they decided to take action against me which was settled out of court.

With the explanation, the defendant's allegation is not substantiated. After all, almost every one of us had debts in our life.

4. With regard to the allegation of PW1 defrauding MBA, PW1's explanation is he does not know his company was already wound up when he purchased the insurance policy from MBA because the company continues carrying out its business and he was not informed of the winding up order by the official receiver. Although his explanation may not be acceptable to the defendant, I gave due weight to his evidence that he withdrew his claim against MBA the moment he knew of the winding up order. What is important to consider here is PW1's conduct upon knowing the truth. So, here again, the defendant failed to show PW1 had an intention to defraud MBA.

5. On the issue of PW1 did not respond immediately on being informed of the fire, I find PW1 was not asked why that is the case. He should be given a chance to explain. Since PW1

was not cross on this point, the defendant's submission that PW1 did not react as a normal person amounts to a speculation only.

6. In relation to the issue of the safe allegedly said to contain RM50,000 worth of jwellery was found ajar, I find both DW1 and DW3 cannot say for certain that the safe was opened before the fire by PW1. None of them is an expert on the reaction of the safe to intense raging fire. Therefore it is possible that the safe was opened due to an intense heat of the fire and the jwellery inside it was burnt in the fire or stolen.

[27] To conclude, taking into consideration circumstantial and direct evidence plus the explanation of PW1 which explanation was accepted by the court, I only need to ask this question. Did I believe PW1 make all those things alleged against him to make a fraudulent claims against the defendants? By standard of proof beyond reasonable doubt, the answer is no. In short the defendants failed to discharge the burden of proving beyond a reasonable doubt that the plaintiffs made a fraudulent claim in this case. The evidence thus far only established suspicion and that is not enough.

[28] The next issue raised by the defendant is the plaintiffs claim is grossly exaggerated.

The Law On Exaggerated Claims

[29] The issue of exaggerated claim was examined in the case of *Wong Cheong Kong Sdn Bhd v. Prudential Assurance Sdn Bhd* [1998] 1 CLJ 916. The late Vincent Ng J restated the law on exaggerated claims as follows.

> An exaggerated claim will not relieve the insurer of liability unless the claim can be shown to be fraudulent. An inflated claim will be considered fraudulent only if it is clear, upon proof beyond reasonable doubt that the assured had intended to defraud the insurers or that the over estimation of loss is so serious as to lead to the inference that the assured must have intended to defraud them. Whether a claim was put in with the intention of defrauding the insurance company is a question of facts to be inferred from the surrounding circumstances, which must point towards such intention to defraud, bearing also in mind that the assured may honestly over estimate his loss and that sometimes this maybe due to mistake.

[30] The defendant relied on the evidence of their loss adjuster, DW2 to prove exaggerated claim. DW2's explanation is this. He divide the household items under the following three categories:

(i) Items identified

(ii) Items not identified

(iii) Items not located

[31] Under the first category, the amount claimed by the plaintiffs is RM134,600. Upon his examination at the premises of the fire, he found seven items were overstated and not all items had a supporting invoice. Using the invoice and market price as the yardstick and taking into account depreciation value of each item, he made an adjustment figure of RM69,561.70. This adjustment figure is accepted by the plaintiffs.

[32] Under the second category, the amount claimed by the Plaintiffs is RM93,500. Using the same method, DW2 make an adjustment figure of RM42,915 for the items he could reasonably found and recognized.

[33] Under the third category, the amount claimed by the plaintiffs is RM172,300. However, DW2 did not make any adjustment figure on the basis there was no remnants of the items to confirm the existence of the same in the premises at the time of the fire.

[34] Based on the above, DW2 told the court that the plaintiffs have overstated their claim by RM263,800 or 65.8 %.

[35] I disagree with the defendant's contention that the plaintiffs' claim was grossly exaggerated to defraud the defendant simply based on the calculation made by DW2. The substantial difference between the adjustment figure and the plaintiffs' figure arose because DW2 did not take into account the amount claimed under the third category. Difference in figures and non availability of items do not proof there was an intention to defraud the defendant. Just because the items cannot be located, it does not mean the items were not there in the first place. As stated earlier the items could have been burnt beyond recognition. I cannot ignore the list prepared by PW1. The items per the list must be taken to be true in view of the declaration made by PW1 in the insurance proposal form. PW1's unchallenged evidence that the price he quoted were the actual price but he cannot support it

with the documents as the same were destroyed in the fire must lend support that those missing items do exist prior to the fire. Except for jewellery and electrical equipments which was on the high side, the rest of the figure seems reasonable. Given the circumstances of this case, it is reasonable to infer for those items which do not have an invoice, PW1 may have overstated or overestimate or inflated the value of the items. So, even assuming the plaintiffs' claim is grossly exaggerated, the defendant must show that PW1 inflate the claim to defraud them. In *Globe Trawlers Pte Ltd v. National Employers Mutual General Insurance Association Ltd & Anor* [1989] 1 CLJ 831; [1989] 2 CLJ (Rep) 924, Thean CJ held:

> The mere fact that a claim was exaggerated did not necessarily mean that the claim was fraudulent. It was for an insurer alleging that the claim was fraudulent to show that the claim had been inflated by the insured for the purposes of defrauding the insurer.

[36] But there was no evidence PW1 had intended to defraud the defendant. In the circumstances, I hold the defendant again failed to discharge the burden of proof placed upon them.

Increased In The Sum Insured

[37] The issues raised by the defendant in this regard is PW1 had no justification to increase the sum insured from RM300,000 to RM800,000. PW1 gave two reasons for the increased.

1. He received a notice dated 2 March 1998 from Jerneh Insurance advising him as the policy holder not to underinsure his property. It was not disputed by PW1 that as at 2 March 1998, he was not yet a policy holder with Jerneh. That being the case, the defendant sought to make an issue by suggesting to PW1 that he could not have received the notice when he became the policy holder only on 21 December 1998, nine months later. But PW1 maintain his answer that he received the policy together with the notice. Defendants' witness, DW4 deny having sent the notice to PW1 on the ground the notice was meant for renewal of policy only. Having read the notice as a whole, it is obvious that the notice is not meant for renewal of policy. DW4 was lying. It is probable, the notice being a standard notice, prepared on 2 March 1998 and sent out in the future without having to change the date to all policy holder. In the absence of any evidence that PW1 stole the notice from the defendant, I accept PW1's evidence that

A he received the notice not to underinsure from the defendant. With the said notice in hand, there is a valid reason for PW1 to increase the sum insured.

2. The valuation report made by the valuer for Citibank Berhad
B (PW2) which states the market value of PW1s' house is RM 800,000 and the renovations done to the house. Here, the defendant sought to establish that PW1 was lying when in cross-examination, he claims he made the renovations in 1998. But in re-examination, PW1 said the renovations was done
C after he purchased the property. Counsel for the defendant took it upon himself that this answer meant the renovation was done in 1993, the date the property was purchased.

[38] The question that need to be asked is did PW1 carry out
D renovations or not. His explanation of the renovation he carried out is as follows:

> When I purchase the property, it was a basic bungalow. I had to completely re-wired the entire building because the building is about 15 years old. I had to further re-do the entire plumbing. I
E renovated the entire interior with a plaster ceiling. I erected a car porch that can accommodate 6 cars. I also renovated the entire kitchen with teak wood cabinets. In addition, I also had the entire floor of the bedroom in solid wood. The entire house was air-conditioned.

F **[39]** With the above explanation, I had no doubt whatsoever that PW1 had done extensive renovation to the house. Considering the major renovations done, the sum RM500,000 seems reasonable. It is supported by the photographs tendered in the bundles of document. I also accept PW1's evidence that the valuation report
G by TD Aziz Sdn Bhd dated 1998 was made after the renovation was carried out. So, whether the renovation was made in 1993 or 1998, the established fact is the renovation is done before the valuation report. Although the valuer (PW2) in his evidence states that he would not insure the premises for RM800,000, the issue
H here is not what PW2 thought as a reasonable sum to be insured. But whether PW1 can justify the increase. Here in the valuation report, PW2 himself has mentioned the market value of the premises as RM800,000. Taking into account the renovation, PW1 was entitled to say the value of his house has gone up to
I RM800,000. In the circumstances, I hold the defendants failed to discharge the burden of proving PW1 was lying and had no justification to increase the sum insured. This contention must fail.

[40] Whether The Plaintiffs Have Breached General Condition 11 Of The Policies

General Condition 11 of the Policy states:

> If any claim under this Policy shall be in any respect fraudulent or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy, all benefits there under shall be forfeited.

[41] For the same reasons as stated above, I find there was no evidence adduced by the defendant to prove there was a breach committed by the plaintiffs with regard to condition 11. This contention also must fail.

[42] After evaluating all the evidence presented before the court, I found that the plaintiffs have established on the balance of probabilities that their claim is not fraudulent and they have not breached any of the policies conditions. As such, the defendants are liable to indemnify the plaintiffs the losses suffered by them.

[43] Quantum

(a) Loss Of Household Items

It is trite law that the loss recoverable on items destroyed would not be based on the replacement value but the market value of a similar property at the time of the fire bearing in mind the age, the characteristic and condition of the insured items. The plaintiffs is claiming the maximum amount insured ie, RM400,400. On the basis that PW1 may have overestimate or overstated the value of the items as well as taking into account depreciation, I was of the opinion that it is not reasonable to allow the maximum amount claimed. I agree with the method adopted by DW2 in arriving at the adjustment figure as representing the loss suffered by the plaintiffs. In view of the two categories was reduced to almost half of the amount claimed, I reduce to half the sum of RM172,300. That would give a figure of RM86,150. The total amount allowed will therefore be as follows:

Items identified	-	RM69,561.70
Items not identified	-	RM 42,915
Item not located	-	RM 86,150
Total	-	RM198,626.70

(b) Cost Of Removal Of Debris

The plaintiffs claim for a sum of RM40,040 being 10% of the amount insured. The amount claimed is substantial. To succeed in this claim, plaintiffs must prove they had actually spent this sum to remove the debris. This the plaintiffs has failed to do. PW1 was under the impression that since this claim is provided for under the policy, he can simply claim for it. Special damages must be strictly prove. Failure to prove will result in the claim being rejected. So for failing to prove, this claim is rejected by the court.

(c) Cost To Reconstruct A Building

PW1 claims the sum of RM492,786.13. PW4, the Managing Director of Basic Decor Sdn Bhd provide a quotation for the re-construction of the premises at a sum of RM568,889.78. This figure is higher than the amount claimed by PW1. Taking into account the renovation work that had been done to the house, I was of the opinion, RM492,786.78 is reasonable to enable PW1 to rebuild his house having a similar renovation. I therefore allowed the sum RM492,786.13.

(d) Cost Of Removal Of Debris

Here also, for the same reason ie, the plaintiff failed to prove he had actually spent RM80,000 to remove the debris, the claim must fail.

(e) Costs Of Alternative Accommodation

It cannot be denied, because the building has not been reconstruct, the plaintiffs had to find an alternative accommodation. Jerneh Insurance had in fact offered a sum of RM2,000 a month for alternative accommodation. Bearing in mind the house was not reconstruct since March 1999 ago or 120 months, if we multiply with RM2000, the total amount will be RM240,000. Thus the sum of RM80,000 being much lower is reasonable. I therefore allowed the sum RM80,000 claimed.

Jerneh's Counter-claim

[44] The defendant's counter-claim for a sum of RM307,213.87 was made on the premise the plaintiff was responsible for the fire. Since the court's findings was not in the defendant's favour, there is no basis for the counter-claim. The counter-claim must fail.

[45] In conclusion, based on the overall evidence, this court finds on the balance of probabilities, the plaintiffs have succeeded in proving their claim. Judgment is entered for the plaintiffs as follows:

[46] Under Capital Insurance Policy

(a) Loss of household items - RM198,626.70.

(b) Cost of removal of debris - disallowed

Under Jerneh Policy

(c) Cost of reconstruction a building - RM492,786.70

(d) Cost of removal of debris - disallowed

(e) Cost of alternative accommodation - RM80,000

(f) Costs

[47] Items (a), (c), (e) carry an interest of 8% per annum from the date of filing of the writ till satisfaction.

[48] For the same reasons, the defendant's counterclaim is dismissed with costs.